F. M. S.

[APPELLATE CRIMINAL JURISDICTION]
THOMAS, C.J., GERAHTY & McFALL, JJ.
December 6, 1933.

PUBLIC PROSECUTOR.....Appellant.
v.
ABDUL HAMID BIN JAMAL.....Respondent.
[PERAK CRIMINAL APPEAL No. 18 of 1933]

Extradition Enactment, 1914, ss.9 and 10—Nature of proceedings—Rearrest after direction for release—Power to take further proceedings for extradition after an order for discharge.

Where proceedings for extradition have resulted in an order for the discharge of a fugitive criminal made either by the Magistrate before whom such fugitive criminal is brought, or by the Court of a Judge to whom a subsequent application for his release has been made, such discharge is equivalent to an order for discharge made by a Magistrate at a Preliminary Enquiry under Chapter XVII of the Criminal Procedure Code and does not bar further proceedings for the extradition of the fugitive criminal. No question either of *Res Judicata* or *Autrefois Acquit* arises through the previous order for discharge.

Proceedings for extradition are criminal matters. Decision of Mudie, J. reversed.

R. C. Cussen, Deputy Legal Adviser, for Appellant.

T. M. S. O. Mahendran for Respondent.

THOMAS, C. J. delivered the following oral judgment, as follows, **GERAHTY** and **McFALL, JJ.** concurring:

This is an appeal by the Public Prosecutor of the Federated Malay States from the decision of Mudie, J. ordering the respondent, Abdul Hamid, to be discharged from custody and to be set at liberty.

The facts are that the Government of the Netherlands required the extradition of the respondent with reference to a criminal charge of embezzlement. Evidence led before the Magistrate was only as to the arrest of the respondent, and the respondent was committed to prison to await the British Resident's decision. Subsequently an application was made to Hereford, J for the respondent to be set at liberty; that application was not opposed, and the respondent was accordingly discharged.

Later a fresh application was made for the detention of the respondent and thereon a committal order was made. At this hearing the respondent objected that he had already been released.

Then followed an application to the Supreme Court for his release. The application came before Mudie, J. who held that the matter was *res judicata* owing to the previous proceedings. He accordingly ordered that the respondent should be set at liberty.

The appeal has been filed by the Public Prosecutor himself on the ground that the learned Judge was wrong in holding that the matter was already *res judicata*.

Enactment No. 26 of 1914 deals with matters relating to extradition. By section 9(i) of that Enactment provision is made that when a fugitive criminal is brought before a Magistrate, the Magistrate shall hear the case in the same manner and have the same power as if the prisoner were brought before him accused of an offence committed within his jurisdiction and triable by the Supreme Court.

The powers of the Magistrate are, therefore, those contained in Chapter XVII of the Criminal Procedure Code. The Magistrate is thereby empowered to commit or discharge; he does not try the accused person so as to say whether he is guilty or not guilty.

Proceedings for extradition are clearly criminal matters. In his judgment in the case of *Exparte Alice Woodhall*, 20 Q.B.D. at page 838, Bowen, L. J. says:—

> "How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to denote what is sufficient evidence to justify a committal."

The application to Hereford, J. was to have an order for committal discharged. The effect of the order of Hereford, J. was no more than if the Magistrate in the first instance had discharged the respondent. It was not a trial; it did not involve a verdict of guilty or not guilty.

Where an accused person has been discharged by a Magistrate in respect of a charge triable by the Supreme Court, a fresh complaint may be made (see Dinesh Chandra Roy's Criminal Procedure, pages 994-996).

The respondent was not, therefore, entitled to enter a plea of *autrefois acquit*, and the matter was not *res judicata*. The order of Mudie, J. must therefore be set aside and the order of the committing Magistrate must be reinstated.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]
BURTON, J.
February 3, 1934.

J. K. R. LEONARD.....Chargee.
vs.
K. ARUMUGAM.....Chargor.
[NEGRI SEMBILAN ORIGINATING SUMMONS No. 83 of 1932]

The Land Code, 1926—The Civil Procedure Code, 1918—Order for sale of charged land—Extent to which provisions of the Civil Procedure Code are applicable.

On the 19th day of September, 1932, the Court ordered the sale of charged land pursuant to Section 149 of the "Land Code, 1926." Pursuant to such order the land

was sold by public auction on the 14th day of July, 1933, and was knocked down to the chargee. The chargor claimed that there were irregularities in the sale and brought a suit against the chargee to set aside the sale. At the same time he refused to give possession of the land to the Chargee. The Chargee filed an application in the chargee's proceedings for an order that he be put in possession of the land, by virtue of the provisions of Sections 316, 318 and 319 of the "Civil Procedure Code, 1918."

Held, that an order for sale under Section 149 of the "Land Code, 1926" is within the definition of the word "decree" in the Civil Procedure Code, 1918 and that Sections 316, 318 and 319 of the Civil Procedure Code are therefore applicable.

B. J. P. Joaquim (with him *R. Ramani*) for the chargee. The provisions of "The Civil Procedure Code, 1918" as to execution apply. An order for sale is a "decree" within the definition thereof in Enactment 15 of 1929. The Chargee is eititled to an order for possession under Sections 316, 318 and 319 of "The Civil Procedure Code, 1918."

M. Morrison for the Chargor. "The Land Code, 1926" is exhaustive. It provides no remedy where a Chargor refuses to give up possession. The only remedy for the purchaser is to bring a suit for possession under Section 8 of "the Specific Relief Enactment, 1903." The provisions of "The Civil Procedure Code, 1918" as to execution cannot apply to an order for sale under Section 149 of "The Land Code, 1926," which is not a "decree."

BURTON, J. delivered an oral judgment as follows:—

"The Order for Sale was made pursuant to Section 149 of the Land Code, 1926, which creates no procedure for a case where a Chargor refuses to give possession to the purchaser of the charged land at the Sale held in pursuance of the order. Section 149 of the Land Code, 1926, in requiring a chargor to shew cause only modifies the procedure of that Code to the special circumstances of charged land. The Originating Summons, by which the chargee applied to the Court, was made under Section 486 of the Civil Procedure Code, 1918, as modified by Section 149 of the Land Code, 1926, and therefore the application to the Court was made under the Civil Procedure Code, 1918. This being the case, the order for sale, which follows on the Summons, is made under the Civil Procedure Code, 1918, and is therefore covered by the definition of the word "decree" in that code, as amended by Enactment 15 of 1929. It follows that the *sequelae* of a decree under the Civil Procedure Code, 1918 attach to an order for sale of charged land insofar as those *sequelae* have not been modified by the provisions of the Land Code, 1926. As regards the present case the Land Code, 1926, contains no provisions at all, and I hold that Sections 316, 318 and 319 of the Civil Procedure Code 1918, are applicable, and I make an order for possession of the charged land."

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

GERAHTY, J.

July 14, 1933.

1. KAN TAK FEE
2. NG AH HOE } Plaintiffs.
3. FOO LIN YING

vs.

AU PHIN YEAN.....Defendant.

[PERAK CIVIL SUIT No. 667 of 1932.]

Fraud—The defence of fraud can only be pleaded by an innocent party.

The defendant accepted the transfer of certain property belonging to a third party in furtherance of an arrangement made to defeat the creditors of the latter, and executed a declaration of trust in favour of the plaintiffs, who at that time had no knowledge of the transfer or of the declaration of trust.

The defendant subsequently charged a portion of the property to the Bank of Malaya and ultimately transferred it in satisfaction of the charge.

The plaintiffs who later learned of the existence of the declaration of trust claimed from the defendant the value of the property, so charged and transferred, together with interest.

The defendant alleged that the whole transaction was fictitious and that he was not in fact a trustee for the plaintiffs but acting to assist the original transferor to defeat creditors.

Held, that the defendant could not set up his own fraud in order to avoid the declaration of trust.

Roberts v. *Roberts*, 106 E.R. 401 followed.

S. Seenivasagam for Plaintiffs.

John L. Woods for Defendant.

Cur. Adv. Vult.

GERAHTY, J.—By their plaint the plaintiffs contend that on the 7th December, 1927, Kan Kheng Hin the father of plaintiff No. 1 and husband of plaintiffs Nos. 2 and 3 transferred 10 pieces of land to the defendant to hold the same in trust for the plaintiffs and that on the 9th January, 1928, the defendant by a document marked Exhibit "A" herein, declared himself trustee of the said lands for the plaintiffs.

It is further contended that the defendant between March, 1928, and September, 1929, at the request of the plaintiffs transferred to Kan Kheng Hin or otherwise dealt with 8 pieces out of the 10 pieces of land previously transferred to him and that between July, 1928, and November, 1930, he charged the remaining lands to the Bank of Malaya Limited, Ipoh, with repayment of monies advanced to him, the defendant, by the Bank and that in 1932 he transferred these lands to the Bank in satisfaction of the charges. That these charges and transfers were made by the defendant for his own benefit and without the consent or knowledge of the plaintiffs and in breach of the trust imposed upon him.

The plaintiffs claim $16,000 a sum based on the present market value of the properties so charged and transferred together with interest at 8% from 1st January, 1932, the date upon which the plaintiffs ceased to receive the rents and profits from the lands in question.